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In the Supreme Court of the United States

OCTOBER TERM, 1959

ELLIOTT J. ROSCHUNI AND
JUNE GILBERT ROSCHUNI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	3
Conclusion	5

CITATIONS

Cases:

Commissioner v. *Wilcox*, 327 U.S. 404	5
North American Oil v. *Burnet*, 286 U.S. 417	5

Statute:

Internal Revenue Code of 1939, § 115(a) (26 U.S.C. (1952 ed.) 115(a))	3

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OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. 13-31) are reported at 29 T.C. 1193. The *per curiam* opinion of the court of appeals (Pet. 12) is reported at 271 F. 2d 267.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1959 (Pet. 13). The petition for a writ of certiorari was filed on February 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a corporation's payment of the personal expenses of its president and 98% stockholder over a period of years during which no formal dividends were declared was properly found, on the facts, to constitute dividends rather than loans.

STATEMENT

Petitioner's[1] father died intestate in April 1945, leaving his wife and petitioner as his heirs-at-law. Petitioner purchased her mother's interest in the estate in January 1947 and was thereafter the sole administratrix of the estate until it was closed in November 1954. The estate owned 524 of the 544 outstanding shares of common stock of the Gilbert System Hotels, Inc.; petitioner owned 10 shares; and the remaining 10 shares were owned by others (Pet. 15-16). During 1947-1951, petitioner was president, treasurer, and a director of Hotels, Inc. (Pet. 22).

From 1945 through the date of the trial, bills for petitioner's personal expenses were sent to and paid by the corporation and charged to petitioner's account. The corporation also furnished, and charged to petitioner's account, the funds payable to petitioner's mother for her interest in the estate. Petitioner's net withdrawals from the corporation (in excess of the credits to her account) for the years 1947-1951 were (Pet. 20):

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[1] June Gilbert Roschuni will be referred to as the sole petitioner. Elliott J. Roschuni is a party only because he filed joint income tax returns with his wife.

1947	$41,083
1948	24,658
1949	83,485
1950	22,341
1951	17,902

The debit balance in petitioner's account on December 31, 1951, was $211,199. No notes or security were given the corporation to cover the withdrawals; no interest was charged; and no time for repayment was fixed (Pet. 19-20). The corporation declared no dividends during the years 1947-1951 (Pet. 22).

On their joint income tax returns for 1947-1951, petitioner and her husband reported gross income in amounts between $6,000 and $11,000, consisting almost entirely of salary paid by Hotels, Inc. (Pet. 24). Petitioner's withdrawals from the corporation were not reported as income.

In deficiency proceedings, the Tax Court found that "during the taxable years June had no intention with regard to the repayment of these withdrawals, that she considered the corporation as hers, and intended to use its available funds as her own financial needs and conveniences dictated" (Pet. 28-29) and held that the net withdrawals constituted taxable dividends under § 115(a) of the Internal Revenue Code of 1939 (Pet. 2-3) to the extent of the available earnings and profits (Pet. 30-31). The court of appeals affirmed *per curiam* (Pet. 12).

ARGUMENT

The finding of both courts below that petitioner's withdrawals were dividends and not loans is fully supported. Through her father's estate, of which

she was the sole heir and sole administratrix, petitioner controlled, and had the complete beneficial interest in, over 98% of the corporation's stock. She was also president, treasurer, and a director of the corporation. By virtue of her complete control of the corporation, she was able to, and did, draw upon the corporation's assets at will to satisfy her personal needs and convenience. The withdrawals were substantial and continued over a long period of time. No notes were given; no interest was charged; and petitioner's repayments were sporadic and insubstantial. There was no evidence of substance of any intent or plan to repay the withdrawals, and there was no agreement between petitioner and the corporation specifying the time or method of repayment. Petitioner had no resources other than her stock and personal residence[2] with which to repay the corporation. During the period of the withdrawals, which exceeded the earnings and profits of the corporation, the corporation declared no formal dividends. In effect, petitioner, while in form foregoing formal dividends, treated the earnings and profits of the corporation as her own and drew upon them at will to meet her personal living expenses. The courts below correctly concluded that, to the extent that they were out of earnings and profits, the withdrawals were in substance and effect dividends rather than loans.

---

[2] In May 1954, after the investigation of this case had begun, petitioner deeded the residence to the corporation, for which her account was credited in the amount of $70,884. The corporation at the same time leased the house back to petitioner's husband (Pet. 24).

The alleged conflict (Pet. 6-8) with the decisions of this Court in *North American Oil* v. *Burnet*, 286 U.S. 417, 424, and *Commissioner* v. *Wilcox*, 327 U.S. 404, could arise, if at all, only if the advances here were in fact loans, but that is the very factual issue which has been decided adversely to petitioner by both courts below. Similarly, the alleged conflict (Pet. 8-10) with decisions of other courts of appeals merely reflects a difference in factual situations rather than any disagreement in principle, the courts in those cases finding that the advances were in fact loans, a factual finding rejected by both courts here.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 1960.

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